

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

BILLIE HAVILAND,

Plaintiff,

v.

CAROLYN W. COLVIN,
Commissioner of Social Security,

Defendant.

No. 1:15-CV-3209-JTR

ORDER GRANTING, IN PART,
PLAINTIFF'S MOTION FOR
SUMMARY JUDGMENT AND
REMANDING FOR ADDITIONAL
PROCEEDINGS

BEFORE THE COURT are cross-motions for summary judgment. ECF No. 15, 17. Attorney D. James Tree represents Billie Haviland (Plaintiff); Special Assistant United States Attorney Daphne Banay represents the Commissioner of Social Security (Defendant). The parties have consented to proceed before a magistrate judge. ECF No. 7. After reviewing the administrative record and the briefs filed by the parties, the Court **GRANTS, in part**, Plaintiff's Motion for Summary Judgment; **DENIES** Defendant's Motion for Summary Judgment; and **REMANDS** the matter to the Commissioner for additional proceedings pursuant to 42 U.S.C. § 405(g).

JURISDICTION

Plaintiff filed applications for Disability Insurance Benefits and Supplemental Security Income on November 28, 2011, alleging disability since July 1, 2002, due to "Stenosing Tenosynovitis," bipolar syndrome, rheumatoid arthritis, diabetes, "Recovering drug addict," and posttraumatic stress disorder (PTSD). Tr. 270. The applications were denied initially and upon reconsideration.

1 Administrative Law Judge (ALJ) Laura Valente held a hearing on January 21,
2 2014, Tr. 42-78, and issued an unfavorable decision on April 25, 2014, Tr. 20-36.
3 The Appeals Council denied Plaintiff's request for review on October 15, 2015.
4 Tr. 1-6. The ALJ's April 2014 decision thus became the final decision of the
5 Commissioner, which is appealable to the district court pursuant to 42 U.S.C. §
6 405(g). Plaintiff filed this action for judicial review on December 15, 2015. ECF
7 No. 1, 4.

8 **STATEMENT OF FACTS**

9 Plaintiff was born on July 7, 1972, and was 29 years old on the alleged onset
10 date, July 1, 2002. Tr. 211. Plaintiff completed school through the 11th grade, and
11 it does not appear she has obtained a GED. Tr. 271, 578. She has worked as a
12 bartender, a caregiver, an escrow clerk at a title company, a receptionist and a
13 laborer. Tr. 72, 271. At the administrative hearing, Plaintiff testified she
14 attempted a return to work in 2009. Tr. 54-55. She worked for a temp agency
15 doing manual labor jobs, but was let go because she was allegedly unable to
16 perform the work. Tr. 55-57. She stated she worked two temporary jobs, full-
17 time, for a period of 10 or 12 months. Tr. 55-57. Plaintiff's "Disability Report"
18 indicates she was working as a caregiver at the time of the reporting. Tr. 270-271.
19 Since 2010, she has been a paid care provider for her developmentally delayed
20 daughter. Tr. 57-58. Plaintiff indicated her daughter was fairly self-sufficient and
21 primarily needed help with being kept safe and making good choices. Tr. 59-60.

22 Plaintiff testified that in 2002 she cared for her two children, ages three and
23 12/13. Tr. 47. She stated, at that time and because of her back pain, she received
24 assistance from her mother and mother-in-law with childcare, housework, and yard
25 care. Tr. 48. Between 2002 and 2006, she was still able to take care of her
26 personal hygiene, drive and do the grocery shopping. Tr. 49-50. However,
27 Plaintiff indicated she would need help with heavy items while grocery shopping
28 and she did not drive long distances (less than 15 minutes at a time). Tr. 50-51. In

1 2005, her children and husband started to assist her with everyday chores as
2 opposed to her mother and mother-in-law. Tr. 50. She stated she was able to do
3 chores like dusting, cleaning the floors, and doing the dishes throughout the day,
4 but these chores would be punctuated with periods of rest. Tr. 52. Plaintiff
5 testified she spends most of the day lying down due to her back pain. Tr. 53.

6 With respect to Plaintiff's back pain, she testified she had prior back
7 surgery, was scheduled for additional back surgery, and was planning a future
8 surgery on her neck. Tr. 60-61. Plaintiff stated her decision to undergo these
9 surgeries was the result of increased difficulty with walking. Tr. 62. At the time
10 of the hearing, she was using a walker and/or a cane to assist her with walking. Tr.
11 62. Plaintiff testified she had radiating pain in both legs, but the pain was more
12 severe on the right. Tr. 65. The pain radiated all the way to her toes. Tr. 65. She
13 stated she also had radiating pain in her arms and hands and many times her hands
14 are numb and swollen. Tr. 65.

15 Plaintiff testified she has experienced migraine headaches since a 1989 car
16 accident. Tr. 53. She described the migraines as sometimes lasting all day, and
17 she must lie down in a dark, quiet room to alleviate the symptoms. Tr. 53-54.
18 Plaintiff also indicated she has a bipolar disorder and experienced anxiety/panic
19 attacks. Tr. 66-67, 69-70. She further stated she experiences symptoms from
20 PTSD, including flashbacks, nightmares, panic attacks and difficulty being around
21 strangers. Tr. 69. However, Plaintiff was not receiving treatment for any mental
22 health issues at the time of the administrative hearing and indicated she did not
23 take medication for mental health symptoms because it caused her to gain weight.
24 Tr. 65-66.

25 Plaintiff testified she had used cocaine and crack cocaine off and on since
26 1989. Tr. 64. She indicated she continued to use marijuana on a daily basis, but
27 had never used methamphetamine or heroin and never had a problem with alcohol.
28 Tr. 64. She stated she last used street drugs in 2006. Tr. 63-64.

STANDARD OF REVIEW

The ALJ is responsible for determining credibility, resolving conflicts in medical testimony, and resolving ambiguities. *Andrews v. Shalala*, 53 F.3d 1035, 1039 (9th Cir. 1995). The ALJ's determinations of law are reviewed *de novo*, with deference to a reasonable construction of the applicable statutes. *McNatt v. Apfel*, 201 F.3d 1084, 1087 (9th Cir. 2000). The decision of the ALJ may be reversed only if it is not supported by substantial evidence or if it is based on legal error. *Tackett v. Apfel*, 180 F.3d 1094, 1097 (9th Cir. 1999). Substantial evidence is defined as being more than a mere scintilla, but less than a preponderance. *Id.* at 1098. Put another way, substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. *Richardson v. Perales*, 402 U.S. 389, 401 (1971). If the evidence is susceptible to more than one rational interpretation, the court may not substitute its judgment for that of the ALJ. *Tackett*, 180 F.3d at 1097; *Morgan v. Commissioner of Social Sec. Admin.*, 169 F.3d 595, 599 (9th Cir. 1999). Nevertheless, a decision supported by substantial evidence will still be set aside if the proper legal standards were not applied in weighing the evidence and making the decision. *Browner v. Secretary of Health and Human Services*, 839 F.2d 432, 433 (9th Cir. 1988). If substantial evidence supports the administrative findings, or if conflicting evidence supports a finding of either disability or non-disability, the ALJ's determination is conclusive. *Sprague v. Bowen*, 812 F.2d 1226, 1229-1230 (9th Cir. 1987).

SEQUENTIAL EVALUATION PROCESS

The Commissioner has established a five-step sequential evaluation process for determining whether a person is disabled. 20 C.F.R. §§ 404.1520(a), 416.920(a); *Bowen v. Yuckert*, 482 U.S. 137, 140-142 (1987). In steps one through four, the burden of proof rests upon the claimant to establish a prima facie case of entitlement to disability benefits. *Tackett*, 180 F.3d at 1098-1099. This burden is met once a claimant establishes that a physical or mental impairment prevents her

1 from engaging in her previous occupation. 20 C.F.R. §§ 404.1520(a)(4),
2 416.920(a)(4). If a claimant cannot do her past relevant work, the ALJ proceeds to
3 step five, and the burden shifts to the Commissioner to show that (1) the claimant
4 can make an adjustment to other work; and (2) specific jobs exist in the national
5 economy which claimant can perform. *Batson v. Commissioner of Social Sec.*
6 *Admin.*, 359 F.3d 1190, 1193-1194 (2004). If a claimant cannot make an
7 adjustment to other work in the national economy, a finding of “disabled” is made.
8 20 C.F.R. §§ 404.1520(a)(4)(v), 416.920(a)(4)(v).

9 ADMINISTRATIVE DECISION

10 On April 25, 2014, the ALJ issued a decision finding Plaintiff was not
11 disabled as defined in the Social Security Act.

12 At step one, the ALJ found Plaintiff had not engaged in substantial gainful
13 activity since July 1, 2002, the alleged onset date. Tr. 22. At step two, the ALJ
14 determined Plaintiff had the following severe impairments: degenerative disc
15 disease with radiculopathy, degenerative joint disease of the right knee, and
16 obesity. Tr. 22. The ALJ specifically found Plaintiff’s diabetes mellitus, fatty
17 infiltration of her liver, migraine headaches, bilateral dorsal tenosynovitis and
18 carpal tunnel syndrome, rheumatoid arthritis, and mental health issues were not
19 severe impairments. Tr. 24-27. At step three, the ALJ found Plaintiff did not have
20 an impairment or combination of impairments that meets or medically equals the
21 severity of one of the listed impairments. Tr. 27.

22 The ALJ assessed Plaintiff’s Residual Functional Capacity (RFC) and
23 determined Plaintiff could perform sedentary exertion level work, but with the
24 following additional limitations: she could lift and carry 10 pounds occasionally
25 and less than 10 pounds frequently; could stand or walk, combined, for four hours
26 total and sit for six hours total in an eight-hour workday; could frequently push or
27 pull with her bilateral upper extremities up to the weight limits for lifting and
28 carrying; could perform all postural movements occasionally, except never climb

1 ladders, ropes or scaffolds, and frequently balance; could occasionally push or pull
2 with the right lower extremity, such as for operation of foot pedals; could
3 frequently reach overhead, bilaterally; and must avoid concentrated exposure to
4 extreme cold, vibrations, and hazards, such as heights or dangerous machinery. Tr.
5 28.

6 At step four, the ALJ found Plaintiff was unable to perform her past relevant
7 work as a receptionist, a bartender, an escrow clerk and a child monitor. Tr. 34.

8 At step five, the ALJ determined that, considering Plaintiff's age, education, work
9 experience and RFC, and based on the testimony of the vocational expert, Plaintiff
10 was capable of making a successful adjustment to other work that exists in
11 significant numbers in the national economy, including the jobs of bench
12 assembler and call-out operator. Tr. 35-36. The ALJ thus concluded Plaintiff was
13 not under a disability within the meaning of the Social Security Act at any time
14 from July 1, 2002, the alleged onset date, through the date of the ALJ's decision,
15 April 25, 2014.

16 ISSUES

17 The question presented is whether substantial evidence supports the ALJ's
18 decision denying benefits and, if so, whether that decision is based on proper legal
19 standards. Plaintiff contends the ALJ erred by (1) excluding multiple severe
20 impairments at step two of the sequential evaluation process; (2) discrediting
21 Plaintiff's symptom testimony; and (3) improperly rejecting the opinions of Drs.
22 Pellicer and Mbakwe.

23 DISCUSSION

24 A. Plaintiff's Subjective Complaints

25 Plaintiff contends the ALJ erred by improperly rejecting her testimony as not
26 credible. ECF No. 15 at 11-18.

27 It is the province of the ALJ to make credibility determinations. *Andrews v.*
28 *Shalala*, 53 F.3d 1035, 1039 (9th Cir. 1995). However, the ALJ's findings must be

1 supported by specific cogent reasons. *Rashad v. Sullivan*, 903 F.2d 1229, 1231
2 (9th Cir. 1990). Once the claimant produces medical evidence of an underlying
3 medical impairment, the ALJ may not discredit testimony as to the severity of an
4 impairment because it is unsupported by medical evidence. *Reddick v. Chater*, 157
5 F.3d 715, 722 (9th Cir. 1998). Absent affirmative evidence of malingering, the
6 ALJ's reasons for rejecting the claimant's testimony must be "specific, clear and
7 convincing." *Smolen v. Chater*, 80 F.3d 1273, 1281 (9th Cir. 1996); *Lester v.*
8 *Chater*, 81 F.3d 821, 834 (9th Cir. 1995). "General findings are insufficient:
9 rather the ALJ must identify what testimony is not credible and what evidence
10 undermines the claimant's complaints." *Lester*, 81 F.3d at 834; *Dodrill v. Shalala*,
11 12 F.3d 915, 918 (9th Cir. 1993).

12 In this case, the ALJ found Plaintiff's medically determinable impairments
13 could possibly cause the alleged symptoms; however, Plaintiff's statements
14 concerning the intensity, persistence and limiting effects of these symptoms were
15 not entirely credible. Tr. 29. With regard to this credibility determination, the ALJ
16 provided numerous valid reasons for finding Plaintiff less than fully credible.

17 First, the ALJ indicated the medical evidence of record did not support
18 Plaintiff's assertions about her physical limitations. Tr. 29-30. A lack of
19 supporting objective medical evidence is a factor which may be considered in
20 evaluating a claimant's credibility, provided it is not the sole factor. *Bunnell v.*
21 *Sullivan*, 347 F.2d 341, 345 (9th Cir. 1991). The ALJ noted the findings and
22 opinions of Dale Thuline, M.D., Tr. 88-90, Gordon Hale, M.D., Tr. 112-114, and
23 Mary Pellicer, M.D., Tr. 414, as consistent with the ALJ's conclusion that Plaintiff
24 could perform sedentary work. Tr. 29. Furthermore, the ALJ indicated the
25 November 2011 report of Todd B. Orvald, M.D., Tr. 487-489, refuted Plaintiff's
26 allegations of disabling physical symptoms since Dr. Orvald found no clear
27 etiology for Plaintiff's low back and bilateral leg pain and nothing from a surgical
28 standpoint which suggested pathology. Tr. 30. The ALJ noted Plaintiff showed

1 normal gait and station in February 2010 and reported being in “excellent health
2 with no ongoing medical issues” aside from ganglion cysts in her wrists and
3 numbness in her hands, Tr. 500-501; March 2010 exam notes showed Plaintiff had
4 full range of motion in her spine, normal gait, and normal muscle strength, Tr. 405-
5 406; in May 2011 Plaintiff appeared comfortable during a physical examination
6 and denied joint pain or swelling, Tr. 512; and Plaintiff walked with normal gait
7 and retained full motor strength in her lower extremities in January 2012, despite
8 also presenting with significant spinal range of motion limitations and a positive
9 straight leg raising test, Tr. 570-572. Tr. 30. As determined by the ALJ, the
10 evidence of record does not support the disabling physical symptoms asserted by
11 Plaintiff in this case. It was thus proper for the ALJ to conclude Plaintiff was not
12 entirely credible because her alleged level of physical limitation was not consistent
13 with the medical evidence.

14 The ALJ also reported records show Plaintiff’s symptoms responded to
15 treatment and were thus not as severe as she alleged. Tr. 30. The effectiveness of
16 medication and treatment in alleviating pain and other symptoms is a relevant
17 factor to consider in evaluating the severity of a claimant’s symptoms. 20 C.F.R. §
18 416.929(c)(3)(iv)-(v); *see Morgan v. Comm’r of Social Sec. Admin.*, 169 F.3d 595,
19 600 (9th Cir. 1999) (an ALJ may properly rely on a report that a claimant’s
20 symptoms improved with the use of medication); *Odle v. Heckler*, 707 F.2d 439,
21 440 (9th Cir. 1983) (noting impairments that are controlled by treatment cannot be
22 considered disabling). In September 2012, Plaintiff ambulated with difficulty,
23 displayed tenderness along her spine, and range of motion was limited in her spine.
24 Tr. 30, 634. Plaintiff was started on tramadol for the pain. *Id.* In October 2012,
25 Plaintiff had no tenderness over her spine, normal range of motion, full strength in
26 her extremities, and no signs of acute synovitis. Tr. 30, 607. In November 2012,
27 Plaintiff again had no tenderness over her spine and normal range of motion. Tr.
28 30, 605. She reported no complaints, stated she “feels really good,” and was very

1 happy with the tramadol because it had relieved most of her pain and she was able
2 to sleep “very well”. Tr. 30, 603. Plaintiff’s symptoms worsened in May/June
3 2013, and she underwent back surgery in July 2013. Tr. 30. At a four-month post-
4 operative appointment in November 2013, Plaintiff reported 0/10 pain, walking
5 with no assistive devices, and that her radiculopathic pain was improving with
6 Neurontin. Tr. 30, 666. The examination revealed full strength in all muscle
7 groups of her extremities. *Id.* As indicated by the ALJ, the record reflects the
8 effectiveness of medication and treatment in alleviating Plaintiff’s symptoms. It
9 was proper for the ALJ to conclude Plaintiff’s was not fully credible because
10 medical reports show her symptoms improved with medication and treatment.

11 The ALJ next noted the record revealed inconsistencies in Plaintiff’s
12 reporting, which diminished her credibility. Tr. 30-31. Inconsistencies in a
13 disability claimant’s testimony support a decision by an ALJ that a claimant lacks
14 credibility with respect to her claim of disabling pain. *Nyman v. Heckler*, 779 F.2d
15 528, 531 (9th Cir. 1986). The ALJ indicated the record showed significant
16 inconsistencies in Plaintiff’s pain reports. Tr. 30. For example, Plaintiff reported
17 on April 8, 2013, to taking only ibuprofen for back pain and stated she had no
18 muscle aches or weakness, no arthralgias or joint pain, and no swelling in her
19 extremities. Tr. 30, 593-595. On April 11, 2013, Plaintiff reported her pain as
20 1/10 and said it was occasional, she was not using an assistive device to walk, and
21 had been engaged in light work activity. Tr. 30-31, 639. However, On April 15,
22 2013, Plaintiff complained of back pain radiating into her right leg. Tr. 31, 655.
23 The examination found pain with palpation, but revealed normal rotation, normal
24 hip range of motion, and full muscle strength and range of motion in her lower
25 extremities. *Id.* Moreover, while Plaintiff has alleged she uses an assistive device
26 to walk most of the time and testified she underwent back surgery because she
27 could hardly walk, these claims are not consistent with the medical evidence of
28 record. Tr. 31. In January 2012 she walked with a normal gait, Tr. 571; in a

1 March 2012 psychological examination with Jay M. Toews, Ed. D., Tr. 576-580,
2 and June 2013 examination with Hoan P. Tran, M.D., Tr. 662-663, there is no
3 mention of an assistive device for walking (although Dr. Tran did note Plaintiff
4 reported to walking hunched over and would lean on a shopping cart while
5 shopping); in October 2013 Plaintiff mentioned a need for a walker and
6 complained of bilateral, disabling knee pain, but a physical examination did not
7 reveal a “good explanation” for her reported knee pain, Tr. 677-678; and in
8 November 2013 Plaintiff reported to Dr. Tran she was maintaining an active
9 lifestyle, was increasing her ambulation and no longer needed an assistive device
10 to walk, Tr. 666. The ALJ did not err by noting the foregoing inconsistencies to
11 find Plaintiff less than fully credible in this case.

12 The ALJ next indicated the record suggested Plaintiff was motivated by a
13 desire to obtain disability benefits, and this desire for secondary gain eroded the
14 credibility of her allegations of disability. Tr. 31. The Ninth Circuit has
15 recognized that the ALJ may consider the issue of secondary gain in rejecting
16 symptom testimony. *Tidwell v. Apfel*, 161 F.3d 599, 602 (9th Cir. 1998); *Gaddis v.*
17 *Chater*, 76 F.3d 893, 896 (8th Cir. 1996) (allowing an ALJ to judge credibility
18 based on a strong element of secondary gain); *Matney v. Sullivan*, 981 F.2d 1016,
19 1020 (9th Cir. 1992) (the ALJ may properly consider the issue of motivation in
20 assessing credibility). The ALJ noted Plaintiff walked with an antalgic gait and
21 “exhibited significant pain behavior” during Dr. Toews’ March 2012 psychological
22 examination, Tr. 576; Plaintiff’s September 2012 request to Vani Bremjit, M.D., to
23 provide an evaluation for disability was refused, Tr. 652; and Plaintiff requested
24 assistance in pursuit of social security disability in October 2012 from Ogechi
25 Mbakwe, M.D., despite Plaintiff’s reported improvement of symptoms, Tr. 608.
26 Tr. 31. Plaintiff’s apparent motivation for secondary gain is another permissible
27 basis for the ALJ to find Plaintiff less than fully credible in this case.

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1 The ALJ additionally held that Plaintiff's reported activities were
2 inconsistent with the presence of a physical disability. Tr. 31. It is well-
3 established that the nature of daily activities may be considered when evaluating
4 credibility. *Fair v. Bowen*, 885 F.2d 597, 603 (9th Cir. 1989). The ALJ indicated
5 records show Plaintiff reported having no trouble with her activities of daily living
6 in September 2010, Tr. 400; Plaintiff informed Mary Pellicer, M.D., in March
7 2011 that she was able to perform chores and all self-care activities, although they
8 may take a while, Tr. 410; Plaintiff reported to Dr. Toews in March 2012 she was
9 fully independent in self-care, cared for her developmentally delayed daughter, and
10 was able to shop independently, prepare meals, and do light housework and
11 laundry, Tr. 578; and Plaintiff was able to drive to appointments, Tr. 408. Tr. 31.
12 As noted by the ALJ, such activities contradict Plaintiff's allegations of
13 debilitating pain and her claim that she needed help with activities of daily living.
14 Tr. 31. It was proper for the ALJ to consider this level of activity as inconsistent
15 with Plaintiff's claim of totally disabling limitations. *See Molina v. Astrue*, 674
16 F.3d 1104, 1112-1113 (9th Cir. 2012).

17 The ALJ further noted the record revealed Plaintiff had worked during the
18 time period she alleged she was disabled. Tr. 31-32. The ability to work can be
19 considered in assessing credibility. *Bray v. Comm'r Social Security Admin.*, 554
20 F.3d 1219, 1227 (9th Cir. 2009) (finding the ALJ properly discounted a plaintiff's
21 testimony because she recently worked as a personal caregiver for two years and
22 had since sought out other employment). The ALJ indicated Plaintiff testified at
23 the administrative hearing that she worked in 2009 and 2010, Tr. 54-55; Plaintiff
24 reported she worked for a temp agency doing manual labor jobs, but was let go
25 because she was allegedly unable to perform the work, Tr. 55-57; Plaintiff stated
26 she worked two temporary jobs, full-time, for a period of 10 or 12 months, Tr. 55-
27 57; and Plaintiff stated she has worked as a paid care provider for her
28 developmentally delayed daughter since 2010, Tr. 57-58. Tr. 31-32. The ALJ

1 properly determined Plaintiff's ability to perform these physically demanding jobs
2 for several months and provide caregiving services for her daughter contradicted
3 her claims of total disability during the same time period.

4 The ALJ next noted Plaintiff reported she stopped working when her
5 daughter became ill and required care. Tr. 32, 578. It is thus apparent the ALJ
6 found that the fact Plaintiff quit working for reasons unrelated to her impairments
7 detracted from her credibility. Tr. 32. The inability to work due to nondisability
8 factors is a valid basis for rejecting a claimant's credibility. *Bruton v. Massanari*,
9 268 F.3d 824, 828 (9th Cir. 2001) (stating that in making a credibility
10 determination, the ALJ did not err by considering that claimant left his job because
11 he was laid off, rather than because he was injured). The ALJ properly discounted
12 Plaintiff's credibility on the basis that she stopped working for reasons unrelated to
13 her alleged disabling impairments.

14 The ALJ lastly found Plaintiff's inconsistent and inaccurate reports
15 regarding her history of substance abuse further undermined her credibility. Tr.
16 32. An ALJ may properly consider evidence of a claimant's substance use in
17 assessing credibility. *Thomas v. Barnhart*, 278 F.3d 947, 959 (9th Cir. 2002)
18 (ALJ's finding that claimant was not a reliable historian regarding drug and
19 alcohol usage supports a negative credibility determination); *Verduzco v. Apfel*,
20 188 F.3d 1087, 1090 (9th Cir. 1999) (conflicting or inconsistent testimony
21 concerning alcohol or drug use can contribute to an adverse credibility finding).
22 The ALJ noted Plaintiff testified she had used cocaine and crack cocaine off and
23 on since 1989. Tr. 32, 63-64. She stated she continued to use marijuana on a daily
24 basis, but had never used methamphetamine or heroin and never had a problem
25 with alcohol. Tr. 64. Plaintiff testified she last used street drugs in 2006.
26 However, Plaintiff tested positive for methamphetamine during a June 2006
27 hospitalization, Tr. 349; informed Dr. Pellicer in March 2011 she had been sober
28 since July 2005, Tr. 410; denied using illicit drugs in November 2011, Tr. 487; and

1 indicated in September 2012 she had been clean and sober for about 9 years, Tr.
2 633. Tr. 32. It was proper for the ALJ to find these noted inconsistencies
3 regarding Plaintiff's report of substance use diminished her overall credibility.

4 The ALJ is responsible for reviewing the evidence and resolving conflicts or
5 ambiguities in testimony. *Magallanes v. Bowen*, 881 F.2d 747, 751 (9th Cir.
6 1989). It is the role of the trier of fact, not this Court, to resolve conflicts in
7 evidence. *Richardson*, 402 U.S. at 400. The Court has a limited role in
8 determining whether the ALJ's decision is supported by substantial evidence and
9 may not substitute its own judgment for that of the ALJ even if it might justifiably
10 have reached a different result upon de novo review. 42 U.S.C. § 405(g). Based
11 on the foregoing, the Court concludes the rationale provided by the ALJ for
12 discrediting Plaintiff is clear and convincing. Accordingly, the ALJ did not err by
13 finding Plaintiff's allegations were not entirely credible in this case.

14 **B. Step Two**

15 Plaintiff argues the ALJ erred by excluding multiple severe impairments at
16 step two of the sequential evaluation process. ECF No. 15 at 5-11. The
17 undersigned agrees.

18 Plaintiff has the burden of proving she has a severe impairment at step two
19 of the sequential evaluation process. 42 U.S.C. § 423(d)(1)(A); 20 C.F.R. §
20 416.912. In order to meet this burden, Plaintiff must furnish medical and other
21 evidence that shows she has a severe impairment. 20 C.F.R. § 416.912(a). The
22 regulations, 20 C.F.R. §§ 404.1520(c), 416.920(c), provide that an impairment is
23 severe if it significantly limits one's ability to perform basic work activities. An
24 impairment is considered non-severe if it "does not significantly limit your
25 physical or mental ability to do basic work activities." 20 C.F.R. §§ 404.1521,
26 416.921. "Basic work activities" are defined as the abilities and aptitudes
27 necessary to do most jobs. *See* 20 C.F.R. §§ 404.1521(b), 416.921(b).

28 ///

1 Step two is “a de minimis screening device [used] to dispose of groundless
2 claims.” *Smolen v. Chater*, 80 F.3d 1273, 1290 (9th Cir. 1996). An ALJ may find
3 a claimant lacks a medically severe impairment or combination of impairments
4 only when this conclusion is “clearly established by medical evidence.” S.S.R. 85-
5 28 (1985); *Webb v. Barnhart*, 433 F.3d 683, 686-687 (9th Cir. 2005). In reviewing
6 the claimed error, the Court must consider whether the record includes evidence of
7 a severe impairment and, if so, whether the ALJ’s response to that evidence was
8 legally correct.

9 In this case, the ALJ concluded Plaintiff has severe physical impairments;
10 however, the ALJ evaluated the evidence of record, considered the hearing
11 testimony, and concluded Plaintiff did not have a severe impairment related to her
12 wrist and hand issues, a severe, medically determinable impairment of rheumatoid
13 arthritis, or a severe mental health impairment. Tr. 22-26.

14 **1. Wrist/Hand Impairments and Arthritis**

15 With respect to Plaintiff’s complaints regarding wrist and hand
16 symptomology, the ALJ found her carpal tunnel syndrome symptoms resolved
17 with surgery, she was able to work with tenosynovitis, and objective medical
18 findings indicated she retained good function despite her symptoms. Tr. 24.
19 However, as indicated by Plaintiff, she first reported problems with her hands and
20 wrists in January 2010, Tr. 517, and nerve conduction studies later confirmed
21 bilateral carpal tunnel syndrome, Tr. 502. ECF No. 15 at 8. Plaintiff underwent
22 right carpal tunnel release and extensor tenosynovectomy in November 2010. Tr.
23 503-504. A ligament tear in her left wrist was discovered in April 2011, Tr. 465-
24 466, and she underwent left carpal tunnel release and tenosynovectomy in May
25 2011, Tr. 647. A June 2011 examination revealed swelling in her wrists and
26 hands, with a decreased range of motion in the right wrist, Tr. 509, and a March
27 2012 examination noted decreased handgrip, strength and range of motion in her
28 wrists, Tr. 408-414. In February 2013, Plaintiff reported her left wrist symptoms

1 had returned. Tr. 647-649. Swelling was noted and she once again had decreased
2 range of motion. Tr. 649. A repeat tenosynovectomy of the left wrist was
3 performed in March 2013. Tr. 643-645. In October 2013, Plaintiff presented with
4 increased pain and swelling in her right hand. Tr. 679.

5 With regard to Plaintiff's alleged arthritis, the ALJ concluded the medical
6 record did not definitively establish rheumatoid arthritis as a medically
7 determinable impairment. Tr. 25. However, as noted by the ALJ, laboratory tests
8 performed in February 2010 were positive for RNP autoantibodies, consistent with
9 mixed connective tissue disease, but negative for other factors, Tr. 343. Tr. 25.
10 Rheumatologist Wendy Eider, M.D., examined Plaintiff in June 2011 and found no
11 clear evidence of mixed connective tissue disease, but still diagnosed "arthritis-
12 wrists," Tr. 400-402. Tr. 25. Plaintiff had another positive RNP autoantibodies
13 test in June 2011, Tr. 441, and again in October 2011, Tr. 430. Tr. 25. In
14 November 2011, Todd Orvald, M.D., examined Plaintiff, opined there was "some
15 form of seronegative inflammatory arthropathy probably taking place," and
16 referred Plaintiff to a rheumatologist. Tr. 489. Plaintiff had another positive RNP
17 autoantibodies test in October 2012. Tr. 609. In November 2013, John W.
18 Adkison, M.D., indicated Plaintiff's problem appeared to be some arthritic
19 involvement of the right second MCP joint and felt Plaintiff needed assessment
20 and ongoing care by a rheumatologist. Tr. 675-676. Positive HLA-B27 testing
21 confirmed a diagnosis of spondyloarthropathy arthritis in January 2014. Tr. 689.

22 Although Plaintiff ultimately bears the burden of establishing her disability,
23 *see Bowen*, 482 U.S. at 146, the ALJ has an affirmative duty to supplement
24 Plaintiff's medical record, to the extent it is incomplete, before rejecting her claim
25 of a severe impairment. *See* 20 C.F.R. § 404.1512(e); S.S.R. 96-5p (1996). "In
26 Social Security cases the ALJ has a special duty to fully and fairly develop the
27 record and to assure that the claimant's interests are considered." *Brown v.*
28 *Heckler*, 713 F.2d 441, 443 (9th Cir. 1983). The ALJ's duty to supplement

1 Plaintiff's record is triggered by ambiguous evidence, the ALJ's own finding that
 2 the record is inadequate or the ALJ's reliance on an expert's conclusion that the
 3 evidence is ambiguous. *Tonapetyan v. Halter*, 242 F.3d 1144, 1150 (9th Cir.
 4 2001).

5 At a minimum, the medical evidence was sufficiently ambiguous with regard
 6 to Plaintiff's hand/wrist impairments and arthritis to trigger the ALJ's duty to fully
 7 and fairly develop the record. In any event, the Court finds the medical records, as
 8 outlined above, demonstrate problems with Plaintiff's hands/wrists and arthritis
 9 sufficient to pass the de minimis threshold of step two of the sequential evaluation
 10 process. *See Smolen*, 80 F.3d at 1290.

11 **2. Mental Impairments**

12 As to Plaintiff's mental impairments, the ALJ determined Plaintiff's alleged
 13 affective disorder, PTSD, anxiety disorder, personality disorder and organic mental
 14 disorder did not cause more than minimal limitations in her ability to perform basic
 15 mental work activities. Tr. 26.

16 The ALJ cites the March 2012 psychological evaluation completed by Jay
 17 M. Toews, Ed.D, as support for the conclusion that Plaintiff's mental health
 18 disorders are not severe. Tr. 26. While Dr. Toews opined that Plaintiff appeared
 19 "capable of returning to some type of general office work," he also diagnosed
 20 Plaintiff with PTSD, chronic, mild; bipolar disorder by history; panic disorder by
 21 history, rule out cognitive disorder, not otherwise specified, secondary to motor
 22 vehicle accident; and history of polysubstance abuse in self-reported remission and
 23 assessed a Global Assessment of Functioning (GAF) score¹ of 50-55, indicative of
 24

25 ¹The ALJ has no obligation to credit or even consider GAF scores in the
 26 disability determination. *See* 65 Fed. Reg. 50746, 50764-65 (Aug. 21, 2000) ("The
 27 GAF scale . . . does not have a direct correlation to the severity requirements in our
 28 mental disorders listings."). In fact, the GAF scale is no longer included in the

1 moderate symptoms. Tr. 580. Furthermore, Plaintiff presented at Yakima Valley
2 Memorial Hospital for psychiatric care on January 7, 2005, following three suicide
3 attempts within a two-week period, and it was noted Plaintiff had been on the
4 psychiatric medication Celexa for two years and wanted “to be hospitalized so that
5 she can learn how to cope and get emotionally stable.” Tr. 333, 359-365. In June
6 2006, Plaintiff was again hospitalized for suicidal thoughts. Tr. 348-354. It was
7 noted Plaintiff had a long history of mood swings and affective lability and
8 experienced significant life stressors that led her to not being able to manage her
9 normal levels of distress. Tr. 349. In July 2012, state agency reviewing physicians
10 opined that Plaintiff’s anxiety disorders were severe impairments. Tr. 110. It was
11 noted that Plaintiff’s anxiety with accompanying poor stress tolerance “would
12 interfere with her ability to maintain regular attendance and to persist through a
13 normal workweek. However, this impairment is not so severe that it would prevent
14 her from being able to sustain more than one or two step instructions in a
15 reasonably consistent manner.” Tr. 115.

16 It is apparent from the foregoing medical evidence that Plaintiff’s claim of
17 severe mental impairments was not “groundless.” *Smolen*, 80 F.3d at 1290. The
18 record reflects mental problems sufficient to pass the de minimis threshold of step
19 two of the sequential evaluation process. *Id.*

20 Based on the foregoing, the Court thus finds the ALJ erred at step two of the
21 sequential evaluation process. Accordingly, this matter must be remanded for
22 additional proceedings in order for the ALJ to take into consideration Plaintiff’s
23 severe hand/wrist impairments, arthritis, and mental impairments and the

24 _____
25 DSM–V. Diagnostic And Statistical Manual of Mental Disorders, 16 (5th ed.
26 2013). Nevertheless, “a GAF score may be of considerable help to the ALJ in
27 formulating the RFC.” *Howard v. Comm’r of Soc. Sec.*, 276 F.3d 235, 241 (6th
28 Cir. 2002).

1 limitations those impairments have on Plaintiff's functionality. Although the Court
2 finds that the ALJ erred at step two, it is not clear from the record, as it currently
3 stands, whether Plaintiff's severe physical and mental impairments, either singly or
4 in combination, would prevent her from performing substantial gainful
5 employment. Further development is necessary for a proper determination.

6 **C. Mary Pellicer, M.D, and Ogechi H. Mbakwe, M.D.**

7 Plaintiff contends the ALJ also erred by rejecting the medical opinions of
8 Drs. Pellicer and Mbakwe. ECF No. 15 at 18-20.

9 As determined above, in light of the ALJ's erroneous step two
10 determination, this matter must be remanded for additional proceedings. On
11 remand, the ALJ shall reassess the medical opinions of Dr. Pellicer, Tr. 408-414
12 (manipulative limitations noted), and Dr. Mbakwe, Tr. 591-592 (opinion regarding
13 absenteeism), as well as all other medical evidence of record relevant to Plaintiff's
14 claim for disability benefits. Furthermore, the ALJ shall direct Plaintiff to undergo
15 a new consultative physical examination with particular emphasis on Plaintiff's
16 hand/wrist impairments and arthritis. If warranted, the ALJ shall additionally elicit
17 the testimony of a medical expert at a new administrative hearing.

18 **CONCLUSION**

19 Plaintiff argues the ALJ's decision should be reversed and remanded for an
20 immediate award benefits. The Court has the discretion to remand the case for
21 additional evidence and findings or to award benefits. *Smolen*, 80 F.3d at 1292.
22 The Court may award benefits if the record is fully developed and further
23 administrative proceedings would serve no useful purpose. *Id.* Remand is
24 appropriate when additional administrative proceedings could remedy defects.
25 *Rodriguez v. Bowen*, 876 F.2d 759, 763 (9th Cir. 1989). In this case, the Court
26 finds that further development is necessary for a proper determination to be made.

27 On remand, the ALJ shall revisit step two of the sequential evaluation
28 process and take into consideration Plaintiff's hand/wrist impairments, arthritis,

1 and mental impairments and the limitations stemming from those impairments;
2 reassess Plaintiff's RFC, taking into consideration the opinions of Drs. Pellicer and
3 Mbakwe, as well as any additional or supplemental evidence relevant to Plaintiff's
4 claim for disability benefits; and develop the record further by requiring Plaintiff to
5 undergo a new consultative physical examination with particular emphasis on
6 Plaintiff's hand/wrist impairments and arthritis and a new consultative
7 psychological examination prior to a new administrative hearing. If warranted, the
8 ALJ shall additionally elicit the testimony of medical experts to assist the ALJ in
9 formulating a new RFC determination. The ALJ shall obtain supplemental
10 testimony from a vocational expert, if necessary, and take into consideration any
11 other evidence or testimony relevant to Plaintiff's disability claim.

12 Accordingly, **IT IS ORDERED:**

13 1. Plaintiff's Motion for Summary Judgment, **ECF No. 15**, is
14 **GRANTED, in part.**

15 2. Defendant's Motion for Summary Judgment, **ECF No. 17**, is
16 **DENIED.**

17 3. The matter is **REMANDED** to the Commissioner for additional
18 proceedings consistent with this Order.

19 4. An application for attorney fees may be filed by separate motion.

20 The District Court Executive is directed to file this Order and provide a copy
21 to counsel for Plaintiff and Defendant. Judgment shall be entered for Plaintiff and
22 the file shall be **CLOSED.**

23 DATED January 31, 2017.



A handwritten signature in black ink, appearing to be "M", is written over a horizontal line.

JOHN T. RODGERS
UNITED STATES MAGISTRATE JUDGE